

ROBERT L. BAYLESS

IBLA 85-493

Decided November 26, 1986

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, affirming assessments for incidents of noncompliance.

Vacated.

1. Oil and Gas Leases: Civil Assessments and Penalties

An automatic assessment for failure to maintain effective seals pursuant to the regulation at 43 CFR 3163.3(j) may be vacated by the Board on appeal in view of the suspension of that regulation and the change in Departmental policy that such assessments should be automatically levied.

APPEARANCES: Tommy Roberts, Esq., Farmington, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Robert L. Bayless has appealed a decision dated February 22, 1985, of the New Mexico State Office, Bureau of Land Management (BLM) affirming two citations for incidents of noncompliance (INC's), and the concomitant assessments of \$250 for each INC. On January 15, 1985, appellant received the two contested INC's with respect to the Jicarilla 118 B #1 Well, located in sec. 26, T. 26 N., R. 3 W., Rio Arriba County, New Mexico. One INC was issued because the BS&W valve 1/ on the storage tank located on the well premises was not sealed, and the second was issued because the sales valve was not sealed. Each notice imposed an automatic assessment against appellant in the amount of \$250, pursuant to 43 CFR 3163(j), and specified an abatement period of one day. On January 16, 1985, appellant returned the two notices to BLM with the comment on each that the "[v]alve has been sealed."

On January 17, 1985, appellant received a third INC, relating to the BS&W valve, which, according to the citation, was "not properly sealed."

1/ BS&W is an abbreviation for "basic sediment and water," and a BS&W valve is used for the removal of those substances from the oil.

This INC for failure to abate the prior INC recited as authority the regulation at 43 CFR 3163.3(a). Appellant asserts his pumper had attempted to "effectively seal the valve by wrapping seals around the valve stem." (Request for Procedural and Technical Review, January 29, 1985, at 3). Appellant returned the third INC to BLM on January 18, 1985, noting the BS&W valve had been "re-sealed." Apparently on January 18, 1985, the pumper obtained the parts necessary for proper sealing of the valve and completed the job. An additional automatic assessment of \$250 was imposed against appellant for this latter INC.

Subsequent to receipt of the INC's, appellant filed a request with BLM for technical and procedural review pursuant to 43 CFR 3165.3. Appellant challenged the applicability of the regulation which BLM relied upon in finding that seals were required on the valves. That regulation, 43 CFR 3162.7-4(b)(1), provides:

All appropriate valves on lines entering or leaving oil storage tanks shall be effectively sealed during the production phase and during the sales phase. The piping and connections in a closed system which are tamper proof or tamper resistant are essentially protected from unauthorized or undocumented entry, but the piping and connections in an open system shall be protected.

Specifically, appellant asserted the Jicarilla 118 B #1 Well had been "shut-in" from January 12, 1985, through January 18, 1985, and therefore was neither in the production phase nor in the sales phase when the INC's were issued. ^{2/} Appellant admitted both the BS&W valve and the sales valve were without seals, but argued that the regulations do not require effective seals when a well is not in a production phase or sales phase by virtue of being shut-in.

With respect to the request for technical and procedural review of the INC issued for failure to abate the prior INC, appellant argued he had made a good faith effort to comply with a notice stipulating an unreasonable abatement period, but was unable to comply due to circumstances beyond his control. Thus, appellant asserted, 43 CFR 3163.3(a), pursuant to which the January 18, 1985, INC was issued, did not apply, since that regulation requires an intentional disregard for a written order or instruction before an INC could properly be issued under its authority.

^{2/} The terms "production phase" and "sales phase" are defined as follows in the regulations at 43 CFR 3162.7-3:

"Production phase. That period of time or mode of operation during which crude oil is delivered directly to or through production vessels to the storage facilities.

"Sales phase. That period of time or mode of operation during which crude oil is removed from the storage facilities for sales, transportation or other purposes."

&On February 22, 1985, BLM rendered its decision concerning appellant's request for technical and procedural review. As to appellant's contention that the subject well was shut-in, and thus was not in a production or sales phase of operation, BLM responded:

Production phase or mode of operation is considered to be that period of time or mode in which a well is delivering production to a production vessel or storage facility or pipeline or is capable of delivering production. Any well with storage facilities that meets this criteria is required to have effective seals pursuant to 43 CFR 3162.7-4.

Further, BLM ruled appellant's failure to seal both the BS&W valve and the sales valve was properly cited and documented, and affirmed the automatic assessments of \$250 for each violation in accordance with 43 CFR 3163.3(j). While BLM found appellant had made a good faith effort to abate the violation on the BS&W valve, it ruled that such effort is not relevant under 43 CFR 3163.3. However, BLM rescinded the \$250 assessment imposed for failure to timely abate the prior INC on the basis that under change 3 to Instruction Memorandum 84-594, a cap on the assessments for failure to seal should apply.

This appeal has been brought from the decision of BLM to the extent it affirmed the assessment of \$250 for the two INC's involving failure to maintain effective seals. Appellant has incorporated into his statement of reasons the arguments set forth in his request for procedural and technical review. In addition, appellant argues the BLM interpretation of 43 CFR 3163.3 imposes strict liability upon oil and gas lessees for noncompliance without statutory basis. More specifically, appellant objects that the regulation, with its strict liability features, "results in the imposition of liability regardless of the exercise of due care, the existence of good faith, the lack of knowledge or the lack of fault." (Statement of Reasons at 8). Appellant contends assessments under the regulation as applied by BLM are more accurately characterized as a penalty than liquidated damages.

The regulation pursuant to which BLM levied the assessments for failure to have effective seals, 43 CFR 3163.3, provides in pertinent part:

Certain instances of noncompliance result in loss or damage to the lessor, the amount of which is difficult or impracticable to ascertain. Except where actual losses or damages can be ascertained in an amount larger than that set forth below, the following amounts shall be deemed to cover loss or damage to the lessor from specific instances of noncompliance.

* * * * * *

(j) For failure to maintain effective seals required by the regulations in this part and by applicable orders and notices, or for failure to maintain the integrity of any seal placed upon any property or equipment by the authorized officer, \$250.

[1] We find it unnecessary to decide whether, under the circumstances of this case, a shut-in well is properly considered to be in a producing phase requiring the presence of effective seals. We note the assessment regulation at 43 CFR 3163.3(j) was suspended by notice published in the Federal Register, 50 FR 11517 (Mar. 22, 1985). This suspension was implemented by BLM Instruction Memorandum No. 85-384 (Apr. 16, 1985), which provided in relevant part:

Enclosed is a copy of the Notice of Intent to propose rulemaking which was published in the Federal Register on March 22, 1985. As stated in this notice, the following actions are hereby taken:

--The assessment for noncompliance provisions under 43 CFR 3163.3(c) through (j) are suspended, except where actual loss or damage can be ascertained.

BLM's proposed rulemaking, published on January 30, 1986, at 51 FR 3882, would eliminate automatic assessments for failure to maintain effective seals under 43 CFR 3163.3(j). In the preamble to the proposed regulations, BLM states: "Assessments under the various Acts authorizing the leasing of minerals would be modified by the proposed rulemaking to eliminate automatic assessments for noncompliance involving violations of §§ 3163.3(d), (e), (g), (h), and (j) of the existing regulations." 51 FR 3887 (Jan. 30, 1986) (emphasis added). ^{3/} For minor violations (i.e., those not involving immediate potential effect on public health and safety, the environment, production accountability, or royalty income), notice of violation and a reasonable opportunity to abate the violation are generally required prior to assessment. See 43 CFR 3163.3(b)(1) (proposed), 51 FR 3890 (Jan. 30, 1986). The provision in the proposed regulation at 43 CFR 3165.3(b) regarding review of notices of violations and assessments provides that an aggrieved party may request an administrative review which shall consider all relevant factors including, but not limited to, the following:

(i) Whether a violation actually existed and, if so, whether the corrective action required was reasonable, whether gravity attached to the violation was appropriate, and whether a reasonable abatement period was prescribed.

* * * * *

(ii) Extenuating circumstances which hampered or delayed a good faith effort by the operator to achieve compliance timely.

51 FR at 3892.

^{3/} This Board has previously held that the imposition of automatic assessments was a policy determination and not a statutory or regulatory requirement. See Lyco Energy Corp., 92 IBLA 81, 85 (1986).

We recognize that the regulation at 43 CFR 3163.3(j) was in effect both at the time BLM issued the INC's and on the date of the decision under appeal. Although neither the suspension of the former regulation nor the new proposed regulation is dispositive of this appeal, this Board has recognized in numerous cases that these changes reflect the Department's present policy concerning assessments for incidents of noncompliance involving such matters as failure to maintain effective seals. Accordingly, the Board has on such occasions applied the present policy to these pending cases where it would benefit the affected party and would not be contrary to law, public policy, or intervening third party rights. See Balcron Oil Co., 94 IBLA 71 (1986); Ward Petroleum Corp., 93 IBLA 267 (1986); Yates Petroleum Corp., 91 IBLA 252 (1986). For this reason, we vacate the decision to levy assessments on appellant pursuant to 43 CFR 3163.3(j).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated.

C. Randall Grant, Jr.
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge

